United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

75-7283

United States Court of Appeals

For the Second Circuit.

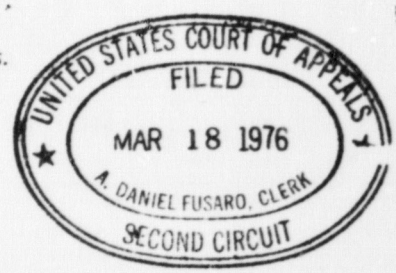
B

P/S

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Plaintiffs-Appellants.

-against-

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA AS THE SECURITIES & EXCHANGE COMMISSION NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORPORATION, NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE INC., NATIONAL CLEARING CORPORATION,
Defendants-Appellees.



On Appeal From The United States District Court for the Southern District of New York

PETITION FOR REHEARING AND SUGGESTION THAT THE REHEARING BE IN BANC

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PETITION FOR REHEARING AND SUGGESTION THAT THE REHEARING BE IN BANC

PRELIMINARY STATEMENT

This case involves an appeal from a judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, J. On March 4, 1976 a three judge panel of this court affirmed. Slip Op. 2377 (2d Cir. 1976). Plaintiffs-appellants Samuel H. Sloan and Samuel H. Sloan & Co. ("Sloan") now petition this court for a rehearing and suggest that the rehearing be in banc.

ARGUMENT

The intemperate language in this court's opinion leaves little doubt that this court is unsympathetic towards any appeal prosecuted by Sloan. In fact, the opinion is such that Sloan can reasonably conclude that any efforts by him to prosecute any appeal in this court will prove to be futile. This is unfortunate particularly since Sloan still has two appeals pending.

These appeals are S.E.C. v. Sloan Docket No. 75-6160 and Sloan v. S.E.C. Docket No. 75-4087. In the first, briefs have been filed and the appeal is on the calendar awaiting the scheduling of argument and in the second there is a substantive motion pending.

The decision of this court dated March 4, 1976 informs Sloan in advance of what this court's decision is going to be in at least the first of these appeals. That appeal, 75-6106, involves the question of whether Judge Ward was correct in adjudging Sloan to be in contempt of court for failure to permit the Securities & Exchange Commission ("S.E.C.") to examine his books and records. Although that appeal involves legal and factual questions, which the S.E.C. contends are now moot, see brief for S.E.C. in 75-6106 p. 6, this court, which presumably has yet to examine the record of that appeal, now says that Sloan "fled the jurisdiction" because he "was a fugitive from justice." Slip op. at 2379.

It should be obvious that this court cannot make such a determination until it review the facts of that case, which it has not yet done. It can be observed that the orders to which this court refers which dismissed the three appeals did not state that Sloan was a "fugitive from justice" nor could such a statement have been made in view of the fact that Sloan has never been indicted or named as a defendant in any criminal case brought by the federal government. It is supposed to be axiomatic that every man is innocent until proven guilty and in the case of Sloan, who had never been arrested or served with a subpoena, warrant or administrative summons, it should be apparent that he never "fled the jurisdiction" because he was not in the jurisdiction in the first instance.

This is only the beginning of the injustice which has occurred in the decision of this case. The decision has the effect of branding Sloan as a

criminal, and probably a lunatic as well, in the eye of anyone who reads this court's decision and is not aware of the underlying facts of the cases in question. This court accomplishes this result by heaping abuse upon the person of Samuel H. Sloan; abuse which is unfair and unjustified.

An example of this occurs in footnote 5 of this court's opinion. It berates Sloan for arguing "that the SEC is a suable entity and that the district court had jurisdiction, while the district court did not mention either problem." Actually, the court is wrong. In the district court the S.E.C.'s principal argument was that a district court lacks subject matter jurisdiction. On this point, it stated that the S.E.C. could not be sued, citing principally Holmes v. Eddy, 341 F.2d 477 (4th Cir. 1965) and Blackmar v. Guerre, 342 U.S. 521 (1952). The district court, in its oral decision which required a fourteen page transcript and which was not particularly cogent, expressed agreement with the S.E.C. and stated that Sloan's remedy was by way of an application to the S.E.C. followed by an original proceeding in the Court of Appeals and "not by an action in this Court." The brief filed by the S.E.C. in this appeal reasserted its position that a district court lacks jurisdiction over the S.E.C., and stated that accordingly Judge Griesa's decision should be affirmed. Even the answer filed by the S.E.C. in the district court asserted lack of jurisdiction and the unsuability of the S.E.C. as affirmative defenses. Thus, Sloan is being criticized for arguing a point which bears a direct "relation to the decision appealed from" even though the court holds otherwise.

It should also be stated that Sloan is being criticized for making an argument in which he was correct. In a decision of this court which came down after Sloan filed his brief, Myers & Myers v. United States Postal Service (2d Cir. December 24, 1975) this court considered the objections of another government agency which were almost identical to those objections made here by the S.E.C. and rejected the same. But this court does not applaud Sloan

for being correct on a previously unsettled legal question, but instead attacks Sloan for briefing this point at all. It is ironic that from comparing the briefs filed in this appeal with the decision of this court it can be observed that Sloan prevailed against this and other arguments advanced by the S.E.C. and yet receives no credit for so doing. For example, in the district court, the S.E.C. argued that Sloan lacked "standing to sue" and that he had failed to exhaust his unspecified "administrative remedies." These arguments were repeated on appeal, although not so emphatically, and Sloan was required to brief these points. By proceeding directly to the constitutional questions involved, this court implies that it finds the arguments of the S.E.C. to be without merit. However, this court does not state that almost all of the arguments presented by the S.E.C. were frivolous, even though this was obviously the case, and instead scolds Sloan for prosecuting this appeal at all.

Many other instances of unfair criticism occur in this court's decision. For example, it states that in a prior decision Sloan's "constitutional attacks on the authority of the S.E.C." were characterized as "frivolous." Actually, in the decision in question, Sloan v. S.E.C. 527 F.2d 11, 12 (2d Cir. 1975) in which Sloan's petition for a rehearing was not denied until January 21, 1976 which was long after Sloan filed his brief in the instant case, this court stated:

> "We consider his blunderous attack frivolous except for his allegation that the 'tacking' of ten-day summary suspension orders by the S.E.C. for an indefinite period constitutes an abuse of that agency's authority and a deprivation of due process."

The claim that Sloan had been deprived of "due process" was, of course, based upon the Fifth Amendment to the Constitution of the United States. However, the court did not decide that claim but instead postponed it for a later day. Thus, it can be said with certainty that not all of Sloan's constitutional claims were considered by this court to be frivolous. Never-

theless, in the last paragraph of this court's opinion, Sloan is threatened with double costs and attorneys' fees, which would be almost astronomical in this case, if he ever dares again to challenge the constitutionality of the Securities Exchange Act of 1934 ("Exchange Act"). Although it has been expressly held that "all constitutional questions are always open," Erie R. Co. v. Tompkins 304 U.S. 64 (1938), it appears from this decision that the route of challenging the constitutionality of the Exchange Act is not open to Sloan now and will not be open to Sloan in the future. This is unfortunate and wrong particularly since it is possible that Sloan is uniquely qualified to challenge the constitutionality of at least one of the S.E.C. rules attacked in this lawsuit, since the only person ever prosecuted by the S.E.C. for alleged violations of Rule 15c 2-11, 17 C.F.R. 240. 15c 2-11, is Sloan himself. That suit is still pending. S.E.C. v. Sloan 74 Civil 5729 (RJW). Although an appeal in that action was dismissed by this court, S.E.C. v. Sloan Docket No. 75-7056, (2d Cir. January 7, 1976) and a prior petition for a writ of mandamus was denied, Sloan v. Ward, Docket No. 75-3001 (2d Cir. January 16, 1975), both of which decisions are noted in footnote 3 of this court's decision, the appeal in question was from a preliminary injunction, and the S.E.C. has recently stated that it intends to prosecute that case to its conclusion, although it has yet to put it on the trial calendar. (A motion to dismiss on the grounds that the S.E.C. failed to comply with a prior discovery order is presently pending before Judge Ward).

Perhaps it was whimsical of Sloan ever to hope that this court, which has been characterized as the "Mother Court" with regard to its interpretation of the Exchange Act, see Blue Chip Stamps v. Manor Drug Stores ___ U.S. ___, 44 L. Ed. 2d 539, 564 (1975), (Blackmun, J., dissenting), would in effect overrule all of its prior landmark decisions by declaring that the entire Act was unconstitutional all along. However, the fact is that the decision of

this court marks the first time that this court has ever declared the Exchange Act as a whole to be constitutional. Here the decision of this court is manifestly in error and the error should hopefully leap out from its opinion.

The decision of this court flatly declares Sloan's attack on the constitutionality of the Exchange Act and the rules and regulations promulgated under it to be frivolous. However, the term "frivolous" is not to be tossed about lightly since it has cogent legal significance, a point which this court has either misapprehended or ignored. As Sloan observed in his Appellant's Brief, a constitutional claim can be rejected as frivolous only where prior Supreme Court decisions foreclose the subject. Since this court does not cite prior Supreme Court decisions which "foreclose the subject" of the constitutionality of the Exchange Act, it is obvious that this court's decision is wrong and must be reversed.

The correctness of this argument can readily be seen from the Supreme Court's decision in Goosby v. Osser 409 U.S. 512, 518 (1973). That decision held that the district court erred in failing to convene a three judge constitutional court. That case is directly on point because, similar to the plaintiff in Goosby v. Osser, Sloan sought that a declaration that a legislative act was unconstitutional and requested that the government be enjoined from enforcing that act. Here, as there, Sloan moved to convene a three judge court.

In Goosby v. Osser the constitutional question presented apparently had little merit, yet nevertheless the Supreme Court stated that a three judge court should have been convened. This decision has since led Judge Lasker to conclude that "the 'foreclosure' hurdle is not a high one." Sugar v. Curtis Circulation Company 377 F. Supp. 1055, 1061 (S.D.N.Y. 1974). The decision of the three judge court, with regard to the constitutional questions involved, is, of course, directly appealable to the Supreme Court of the United States even though a Court of Appeals has jurisdiction to review the non-constitutional

determinations of the three judge court. This circumstance sometimes leads to knotty jurisdictional problems, see e.g. the recent Supreme Court decision of Buckley v. Valeo __ U.S. __ (decided February 2, 1976). However, it is clear from a great many Supreme Court decisions that a three judge court must be convened where, as here, the statute, 28 U.S.C. 2282 and 28 U.S.C. 2284, requires it.

An interesting feature of this court's decision is the way in which it walks a narrow line to reach the conclusion it achieves. It states in effect, that Sloan's constitutional claims are too frivolous to require the convening of a three judge constitutional court but not so frivolous as to require that the provisions of Fed. R. App. p. 38 be invoked. However, again in Goosby v. Osser, supra 409 U.S. at 518 the Supreme Court, citing Ex Parte Poresky 290 U.S. 30, 32 (1933) stated that a claim is frivolous only if "its unsoundness so clearly results from previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought" to be adjudicated are a valid controversy. Since, as Professor Loss had noted, the Supreme Court has yet adjudicated a case in which the question of the constitutionality of the Exchange Act was raised, the district court here must be reversed unless some analogeous Supreme Court decisions can be found which foreclose Sloan's claims. This court has found one case, The Moses Taylor 71 U.S. (4 Wall) 411 (1867), a case which, incidently, was apparently overlooked by both the S.E.C. and the district court and which seems to foreclose Sloan's claim with respect to the constitutionality of Section 27 of the Exchange Act. (15 U.S.C. 78aa). If other Supreme Court decisions could be found which foreclose Sloan's other constitutional claims, then the district court's decision could be affirmed. However, there appears to be no such decisions or, if such decisions exist, they are not cited in this court's opinion. The district court below stated that analogeous decisions

foreclosing Sloan's claims were "legion". However, it did not cite any specific cases. The S.E.C., in its brief filed in this court, stated that Sloan's constitutional claims were "frivolous" and that any detailed discussion of them would be "superfluous." Again no cases were cited.

Sloan, on the other hand, cited numerous decisions which he contends support his constitutional claims. Among these were Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1936) and Panama Refining Co. v. Ryan 293 U.S. 388, 430 (1935), decisions which were recently revived by the Supreme Court in National Cable Television v. United States, 415 U.S. 336, 342 (1974) and its companion case Federal Power Commission v. New England Power Co. 415 U.S. 345 (1974). On Sloan's allegation that he was denied his constitutional right to withdraw as a broker dealer in securities, a claim not mentioned in this court's decision, Sloan cited Jones v. S.E.C. 298 U.S. 1 (1936). On the claim that the broker dealer registration requirement is unconstitutional, Sloan cited Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). On the claim that Rule 17a-5, 17 C.F.R. 240, 17a-5, which requires certain reports to be filed with the S.E.C., is unconstitutional, Sloan cited the "required records" standards set by the Supreme Court in Shapiro v. United States 335 U.S. 1 (1948); Marchetti v. United States 390 U.S. 39 (1968) and Grosso v. United States 390 U.S. 62 (1968). The list goes on. No attempt was made in the brief of the S.E.C. and no effort is made by this court to distinguish those decisions. No contrary case law is cited in this court's opinion. The decision of this court does not even give a detailed statement of what Sloan's constitutional attacks consist of specifically. Instead, Sloan is attacked personally. If nothing else, this approach should be beneath the dignity of this court. Accordingly, this petition for a rehearing should be granted and the decision of this court should be reversed.

A substantial portion of this case deals with antitrust questions,

and the decision of this court purports to dispose of them in one paragraph. Here again this court has misapprehended and/or disregarded the law. In effect, this court decides that the actions taken by the various non-governmental defendants are immune from antitrust liability but does not state what these actions were specifically. However, it has been established that the Exchange Act creates an implied repeal of the antitrust laws only when "necessary to make the Exchange Act work" Silver v. New York Stock Exchange 373 U.S. 341, 357 (1963) and then only to the minimum extent necessary. Sloan's complaint against the National association of Securities Dealers, Inc. ("NASD") and Bunker Ramo Corp. is concerned principally with the operation of the NASDAQ system. This claim is not foreclosed by United States v. National Association of Securities Dealers, Inc. 422 U.S. 694 (1975) or by Gordon v. New York Stock Exchange 422 U.S. 659 (1975) which dealt with resales to the public of mutual funds and with commission rates chargeu to the public by stock exchange members respectively. Since the public has no access the NASDAQ system and since the S.E.C. has yet either to approve or disapprove of the way the NASD and Bunker Ramo Corp. are operating this system it is obvious that the two decisions cited by this court do not foreclose Sloan's claims. In fact, the decision of this court flies in the face of contrary judicial determinations. See Shumate & Co. Inc. v. National Ass'n of Sec. Deal, Inc. 509 F.2d 147, 151 (5th Cir. 1975), cert. denied October 6, 1975, cf. Jacobi v. Bache & Co., Inc. slip op. 5363, 5375-5376 (2d Cir. 1975) cert. denied January 12, 1976.

As to the remaining non-governmental defendants, none of them cited United States v. National Association of Securities Dealers, Inc., supra or Gordon v. New York Stock Exchange, supra nor could they well have done so. Sloan's complaint against the National Quotation Bureau, Inc. ("NQB") was that the NQB has fraudulently, in breach of contract, and in violation of

the antitrust laws refused at various times to publish Sloan's indications of interest as well as Sloan's bid and asked quotations in the pink sheets and that the NQB is guilty of actual monopolization. Sloan's complaint against Disclosure, Inc. is one of actual monopolization and the validity of this complaint appears to turn on the question of whether a contract between the S.E.C. and Disclosure, Inc., which grants to Disclosure, Inc. the exclusive right to photocopy documents filed with the S.E.C. for sale to the public, is legal and whether said contract is authorized by statute. It should be obvious that Sloan's complaint against these two defendants creates a controversy which is vastly different from that involved in the two decisions relied upon by this court, clearly, then, this court's decision should be reversed.

From this discussion it should be obvious that there are many things wrong with this court's decision and that it must be reviewed. Furthermore, it can be seen that this court's decision does several things which it almost certainly the Court of Appeals does not intend to do. For one, in footnote 4 it upholds the constitutionality of Sections 15(c)(5) and 19(a)(4) of the Exchange Act, 15 U.S.C. 78o(c)(5) and 78s(a)(4). However, the Securities Acts Amendments of 1975 moved the old Section 15(c)(5) over to become Section 12(k) (15 U.S.C. 78 l(k)) as amended, substituted in its place an entirely new Section 15(c)(5) and eliminated Section 19(a)(4) altogether. Consequently, as a result of this court's decision, the lawbooks will show that here the constitutionality of the new Section 15(c)(5) and the non-existant Section 19(a)(4) was upheld even though Sloan did not and could not have intended to challenge the constitutionality of these specific provisions. Had this court given more thoughtful consideration to Sloan's argument, rejected in footnote 5, that this action should be remanded in view of the Securities Acts Amendments of 1975, this result would have been avoided.

Another problem in this court's decision can be seen in footnote 5, where this court seems to say that the fact that an attorney is not a member of the bar of the Southern District does not disqualify him from practicing law in that court. One can only assume that this court did not intend to establish by its decision that Sloan, who is not a member of the bar of the Southern District, can now start representing clients.

For yet a third problem, this court establishes as stare decisis the constitutionality of the Exchange Act and the absolute immunity from antitrust liability of all of the non-governmental defendants named here thereby foreclosing these questions from being raised by litigants other than Sloan.

There are other things wrong with this court's decision. However, the point has been made and should not be belabored. It is submitted that there can be no question that this petition for a rehearing should be granted. In addition, it is suggested that the rehearing be in banc. This case involves questions of imperative public importance. In addition, the usual reason for denying and rehearing in banc is not present here. Normally, a rehearing in banc would entail an extraordinary burden upon the active judges of this court. However, in the series of more or less related appeals before this court involving Sloan, which are recited in this court's decision, every judge who is an active member of this court, with the exceptions of the Chief Judge and Judge Mansfield, has participated in at least one decision and all the judges seem to be working together. For example, Judge Feinberg's per curiam opinion in the instant case says that three prior appeals were dismissed because Sloan was a "fugitive from justice" having "fled the jurisdiction" even though the decision and order dismissing those appeals said no such thing and Judge Feinberg was not a member of the panel of judges which

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made those decisions. Thus, it seems that this court presently is deciding these appeals in banc but is doing so on a covert basis. Therefore, nothing would be lost by openly granting a rehearing in banc. In addition, Sloan has a reasonable basis to complain that he is being treated unfairly by this court, and this raises a question which merits in banc consideration.

CONCLUSION

For all of the reasons set forth above, this petition for a rehearing should be granted and the suggestion that the rehearing be in banc should be adopted.

Respectfully submitted,

Samuel H. Sloan

Dated: March 18, 1976

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SLOAN pet.

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 18 day of March 1976 deponent served the within Petition upon:

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the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 18
day of March, 1976

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976